

Before the
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Washington, D.C. 20554

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JAN 25 2005
Federal Communication Commission
Bureau / Office

In the Matter of)

Amendment of Section 73.202(b),)
Table of Allotments,)
FM Broadcast Stations)
(Cambridge and St. Michaels, Maryland))

MB Docket No. 04-20
RM-10842

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JAN 28 2005

Federal Communications Commission
Office of the Secretary

To: Assistant Chief, Audio Division
Media Bureau

MOTION TO INCLUDE STAFF STUDIES IN RECORD

MTS Broadcasting, L.C. ("MTS"), licensee of radio station WCEM-FM, Cambridge, Maryland, and the proponent of a counterproposal in the above-referenced proceeding, hereby moves the Media Bureau (the "Bureau") (1) to include in the record any and all engineering studies which the Bureau ultimately determines are relevant to the Commission's decision in the instant proceeding, and (2) in the event any such studies are placed in the record, to provide a formal opportunity for the parties to file comments on those studies. In support of this motion, the following is stated:

1. In issuing the *Notice of Proposed Rulemaking* (the "NPRM"), the Bureau referenced certain "[e]ngineering studies" that the Bureau had conducted in determining the gain and loss areas of the proposal by CWA Broadcasting, Inc. ("CWA"). *Cambridge and St. Michael's, Maryland*, 19 FCC Rcd 2592, 2593 (Aud. Div. 2004). Those engineering studies were never placed in the record, and MTS took note of that omission in filing its comments on CWA's proposal. *See* MTS Comments and Counterproposal (April 5, 2004) at 4.

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2. In its Reply Comments of December 27, 2004 (as supplemented on January 4, 2005), CWA provided an engineering study which purports to show the gain and loss areas from its proposal. Those engineering studies represented the first such studies to be included in the record with respect to CWA's proposal, and, on January 21, 2005, MTS filed a motion for leave to file a response (the "Response") to CWA's engineering studies. MTS's Response provided further engineering studies concerning the real-life gain and loss areas that would accrue from implementation of CWA's proposal.

3. As reflected in its Response to CWA's Reply Comments of December 27, 2004, MTS does not believe any further engineering studies are warranted. If the Bureau should nonetheless determine otherwise, any new engineering studies (or the engineering studies referenced in the *NPRM*) should be placed in the record and made available for comment by the parties in order to ensure procedural fairness to the parties and the development of an informed record for the Commission's resolution.

4. There should be no doubt about the Bureau's obligation to place any staff engineering studies in the record if there is any prospect of the Commission's reliance on such studies in the disposition of the instant rulemaking proceeding. The courts have repeatedly admonished the Commission and other federal agencies to include in a rulemaking record any staff studies that prove to be relevant to the agency's ultimate disposition of a proceeding. As the United States Court of Appeals for the District of Columbia Circuit observed on one occasion, "We have insisted . . . that information in agency files or consultants' reports which the agency has identified as relevant to the proceeding be disclosed to the parties for adversarial comment." *Home Box Office v. FCC*, 567 F.2d 9, 55 (D.C. Cir.), *cert denied*, 434 U.S. 829 (1977). *Accord NARUC v. FCC*, 737 F.2d 1095, 1121 (D.C. Cir. 1984) (Commission's otherwise fatal failure to include staff study in rulemaking record cured by the Commission's

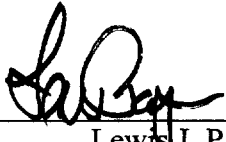
later inclusion of the staff study in the record on reconsideration and the provision of “ample opportunity” for interested entities “to address the staff study”); *Portland Cement Association v. Ruckleshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973) (agency cannot “promulgate rules on the basis of . . . data that, [in] critical degree, is known only to the agency”).

WHEREFORE, in view of the foregoing and the entire record herein, it is respectfully requested that the Bureau (1) place in the record any engineering studies which the Bureau later determines are relevant to the Commission’s ultimate disposition of the issues in the instant proceeding, and (2) provide opportunity for the parties to comment on any such engineering studies placed in the record.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2005 a copy of the foregoing "Motion to Include Staff Studies in Record" was hand-delivered or sent by first-class mail, postage prepaid, to the following:

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